Dated: February 9, 2016

FILED
FEB 26 2016
CHARLES E. POWELL, J.S.C.

CRUSER, MITCHELL & SANCHEZ, LLC
Douglas V. Sanchez, Esq. - 039851989
Mack Cali Corporate Center
50 Tice Boulevard, Suite 363
Woodcliff Lake, New Jersey 07677
(201) 474-7100
Attorneys for Defendants, Delavan Industries, Inc. and Lohr Industries

JACK SUSER,

Plaintiff(s),

v.

DELAVAN INDUSTRIES, INC., LOHR INDUSTRIES, C.F. BENDER CO., ET ALS.,

Defendant(s),

and

C.F. BENDER CO. INC.

Defendant/Third Party Plaintiff,

v.

S&J METAL MANUFACTURING INC.,

Third-Party Defendant/
Fourth-Party Plaintiff,

v.

M&G INDUSTRIES, INC., ABC CORPS 1-100 and JOHN DOES 1-100,

Fourth-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO.: BER-L-1285-12

Civil Action

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS DELAVAN INDUSTRIES, INC. AND LOHR INDUSTRIES

THIS MATTER having been opened to the Court by Cruser, Mitchell & Sanchez, LLC, attorneys for Defendants, Delavan Industries, Inc. and Lohr Industries, on a Cross Motion for Summary Judgment, and the court having considered the papers submitted and any opposition thereto, oral argument, and good cause having been shown;

065

IT IS on this 26th day of February, 2016;

ORDERED that Defendants Delavan Industries, Inc. and Lohr Industries' Cross Motion for Summary Judgment be and is hereby **GRANTED;**

IT IS FURTHER ORDERED that Plaintiff's Amended Complaint and any and all claims that were asserted or could have been asserted against Defendants Delavan Industries, Inc. and Lohr Industries are hereby dismissed with prejudice;

IT IS FURTHER ORDERED that any and all crossclaims that were asserted or could have been asserted against Defendants Delavan Industries, Inc. and Lohr Industries are hereby dismissed with prejudice; and

IT IS FURTHER ORDERED that a copy of this order be served on all parties within seven (7) days of the date hereof.

GRANTED

CHARLES E. POWERS, JR., J.S.C. J.S.C.

[X] Opposed

[ ] Unopposed

SUSER V. DELAVAN INDUSTRIES

DOCKET # L-1285-12

RIDER TO ORDER DATED FEBRUARY 26, 2016

I. Introduction

This is a products liability case in which Plaintiff, Jack Suser ("Plaintiff"), alleges that he was injured on February 8, 2010 when cargo chain(s)/tie-down chain(s) broke while Plaintiff was working on an automobile hauler/trailer allegedly manufactured by Defendants Delevan Industries, Inc. ("Delavan") and Lohr Industries ("Lohr"). This case has been in litigation since February 2012, with Defendants Delavan and Lohr being in the case since the very beginning. Over the course of three and a half years, Plaintiff has amended his complaint to bring in Defendant C.F. Bender Co. Inc. ("C.F. Bender") (alleging that C & F designed, manufactured, sold, distributed, repaired, maintained, modified, rebuilt, owned, leased, supplies and/or otherwise placed into the stream of commerce the product that caused Plaintiffs injuries), who subsequently brought in Third-Party Defendant S&J Metal Manufacturing Inc. ("S&J")(a seller of the product that caused Plaintiff's injuries), who ultimately brought in Fourth-Party Defendant &G Industries, Inc. ("M&G")(wherein S&J alleged common law indemnification and contribution against M & G). The discovery end date for this matter was December 26, 2015.

II. Factual Background

Plaintiff filed a Complaint alleging that he was injured on February 8, 2010, when a defective cargo chain/tie-down chain broke while the Plaintiff was working with the chain on his tractor trailer. Plaintiff alleges that Defendant C.F. Bender Co. Inc., designed, manufactured, sold, distributed, repaired, maintained, modified, rebuilt, owned, leased, supplied and/or otherwise placed into the stream of commerce the subject chain which allegedly caused

Plaintiff's injuries. Defendant C.F. Bender Co. Inc. filed an Answer to Plaintiff's Amended Complaint generally denying the allegations of the Complaint.

On or about July 21, 2015, Defendant C.F. Bender Co. served upon Plaintiff a Notice to Produce the S hook and/or broken chain which allegedly caused Plaintiff's action. As of the date of the Motions, the S hook has not been produced.

On August 7, 2015, this Court entered an Order compelling discovery. The terms of the Order provided than an inspection of the tie rope or apparatus shall be conducted on notice to all parties within 45 days of the filing of an Answer by Fourth-Party Defendant, M & G Industries. It was further stated if an inspection did not occur as set out on the Order, the requirement for an inspection would be deemed waived. The Order further provided that depositions of all parties were to occur at a mutually agreed upon date after completion of the inspection of the product.

An October 9, 2015 Order entered by this Court extended discovery until December 26, 2015 and ordered than an inspection of the subject product; namely, the S Hook and broken chain be completed by October 30, 2015.

By way of motion and cross motion on December 4, 2015, the Court ordered that Defendants Delevan Industries, Inc. and Lohr Industries, Defendant/Third Party Plaintiff C.F. Bender Co. Inc., Third-Party Defendant/Fourth-Party Plaintiff S & J Metal Manufacturing Inc. and Fourth Party Defendants M & G Industries, Inc. have forty-five (45) days from the receipt of Plaintiff's expert report to obtain their own experts; that Defendants Delevan Industries, Inc. and Lohr Industries, Defendant/Third Party Plaintiff C.F. Bender Co. Inc., Third-Party Defendant/Fourth-Party Plaintiff S & J Metal Manufacturing Inc. and Fourth Party Defendants M & G Industries, Inc. have sixty (60) days from the date of this Order to depose experts; and that any discovery delineated here which is not conducted by the dates provided in this Order

shall be deemed waived and that any discovery delineated in the December 4, 2015 Order which is not conducted by the dates provided shall be deemed waived.

III. Contention of the Parties

Third-Party Defendant/Fourth Party Plaintiff, S & J Metal Manufacturing, Inc. moves for summary judgment on the grounds that no expert report has been produced by Plaintiff that places liability on S&J Metal Manufacturing Inc. Plaintiff does not oppose this motion.

Defendants Delevan and Lohr move for summary judgment on the grounds that Plaintiff has failed to set forth any evidence that the subject S Hook and tie down chain were manufactured, sold or supplied by Delevan and Lohr and that Plaintiff's liability expert report is a net opinion without any basis in science or fact.

Plaintiff opposes Defendants Delevan and Lohr's motion for summary judgment on the grounds that Plaintiff's liability expert report establishes an opinion that supports a cause of action against the Defendants.

IV. Legal Analysis

a. Summary Judgment Standard

It is well established that an order for summary judgment "shall be rendered if the pleadings . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court held that: "Whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

An issue is considered to be "genuine" if "the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact." R. 4:46-2(c). Under this standard, "where the evidence 'is so one-sided the one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (quoting Anderson v. Liberty Lobby, Inc., 447 U.S. 252 (1986)). Additionally, "issues of credibility are ordinarily for the trier of fact and the judge does not function as a trier of fact in determining a Motion for Summary Judgment." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954).

b. Products Liability

The standard for liability of a manufacturer or seller in a product liability action is set forth in New Jersey Statute § 2A:58C-2. The statute clearly states,

> A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner. N.J.S.A. § 2A:58C-2

The exclusive method to prosecute such a personal injury claim is under N.J.S.A. 2A:58C-2 by "proving that the product was not reasonably fit, suitable or safe for its intended purpose because it either contained a manufacturing defect, failed to contain adequate warnings or instructions, or was designed in a defective manner." N.J.S.A. 2A:58C-2. Koruba v. American Honda Motor Co., Inc., 396 N.J. Super. 517, 531 (App.Div. 2007).

The New Jersey Supreme Court has held that under the Products Liability Act, "...the ultimate question to be resolved in design-defect and failure-to-warn cases is whether the manufacturer acted in a reasonably prudent manner in designing and fabricating a product." Zaza

v. Marquess & Nell, 144 N.J. 34, 49 (N.J. 1996). "An inference of defectiveness may not be drawn from the mere fact that someone was injured. Liability should be imposed only when the manufacturer is responsible for the defective condition." Id.

c. Plaintiff's Expert Report is a Net Opinion

The net opinion rule mandates that experts "be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992). An expert's conclusion "is excluded if it is based merely on unfounded speculation and unquantified possibilities." Granzanka v. Pfiefer, 301 N.J. Super. 563, 580 (App. Div. 1997). When an expert speculates, "he ceases to be an aid to the trier of fact and becomes nothing more than an additional juror." Jiminez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996). By definition, unsubstantiated expert testimony cannot provide to the factfinder the benefit that N.J.R.E. 702 envisions: a qualified specialist's reliable analysis of an issue "beyond the ken of an average juror." Polzo v. Cnty. Of Essex, 196 N.J. 569, 582 (2008).

Plaintiff's expert report has no basis in science, engineering, or fact. Plaintiff's expert failed to inspect the Delavan trailer car carrier or its chain tie down system before summarily concluding that both were defectively designed, manufactured and installed. In addition, Plaintiff's expert did not inspect or perform any mechanical testing on the S Hook or chain that broke allegedly causing the subject incident. Instead, Plaintiff's expert merely reviewed the Chartis investigation report created by Plaintiff's workers' compensation carrier and the remnant piece of chain still in Plaintiff's possession. Further, Plaintiff's expert report includes photographs of a modern, alternative tie down system utilizing belts and straps from Delavan's and C.F. Bender's current websites to summarily conclude that the chain tie down system did not meet the

requirements of the risk-utility analysis and that a belt tie down system is "probably safer." There is no factual or engineering basis provided for this opinion. The report does not address the fact that the subject 200 Delavan trailer utilized a chain tie down system, which Defendant asserts was the predominant system in the auto hauling industry at that time.

Additionally, Plaintiff's expert fails to address the fact that even current Federal Motor Carrier Safety Regulations set forth by the Department of Transportation approve chain tie down systems within the standards for cargo securement devices and systems. The chain tie down system currently meets the federal performance standards and is still approved for use today just as it was 16 years ago in 2000, when the Delavan auto car carrier was manufactured. Defendant contends that because Plaintiff purchased the Delavan trailer from a prior owner in 2007, seven years after the trailer's manufacture, Plaintiff cannot testify as to whether the chain was not replaced by the original owner. Simply because an alternative tie down system is used in the car hauler industry in 2016 in no way supports Plaintiff's expert baseless conclusion that Delavan's 2000 auto carrier and/or its 2000 chain tie down systems is defective or unreasonably dangerous. Concluding that a tie down system is defective and unreasonably dangerous simply because a more modern tie down system is also available in the industry is wholly without any factual basis or support.

Given the weight that a jury may accord to expert testimony, it is the Court's duty to ensure that an expert is not permitted to express speculative opinions of personal views that are unfounded in the record. N.J.R.E. 702.

V. Delevan and Lohr's Motion for Summary Judgment is Granted

The competent evidence creates no genuine issues of material fact. Plaintiff has failed to produce the subject hook or chain for inspection. Plaintiff's expert report is a net opinion. The

expert report fails to show that Defendant's Delevan and Lohr deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or failed to contain adequate warnings or instructions, or was designed in a defective manner as required by N.J.S.A. § 2A:58C-2.

VI. Conclusion

For the aforementioned reasons, Defendants Delavan and Lohr's motion for summary judgment is GRANTED.